TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~528.~~ 233

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN F. BROADHEAD, JOHN PILLING, AND C. W. ALVEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED JUNE 5, 1886.

ASSIGNMENT OF ERROR.

The judgment is erroneous in this, that the court should have disregarded its findings as based on immaterial issues, and entered judgment for the plaintiff *non obstante* the findings.

ARGUMENT.

The defenses in this case are identical with those in No. 233, saving the defenses therein growing out of the deposit of $5,000; and as the two cases will be argued together, and, it may be presumed, considered by the court together, it is unnecessary to repeat what is said in the brief in No. 233.

It is submitted that the judgment should be reversed, and a judgment *non obstante* entered for the plaintiff.

WM. A. MAURY,
Assistant Attorney-General.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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1 United States circuit court, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN S. BROADHEAD, JOHN PILLING, AND C. W. Alvey, defendants.

Complaint.

Now comes said plaintiff, by S. G. Hilborn, United States attorney for said district of California, and complains of said defendants, and avers that they are, and each of them is, indebted to plaintiff in the sum of five thousand ($5,000) dollars, and for cause of action alleges as follows: That heretofore, to wit, on the twenty-first day of February, A. D. one thousand eight hundred and eighty-two, being then the regular term of the district court of the United States for the district of California, held on the first Monday of December, A. D. 1881, at the city and county of San Francisco, in said district of California, the grand jury of the United States, theretofore duly impanneled and sworn before the said district court, did find
2 and *and* present a certain bill of indictment against the said defendant, John F. Broadhead, charging him with the commission of certain offenses against the laws of the United States, that is to say: That the said John F. Broadhead, on the 13th day of January, A. D. 1882, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this court, did then and there unlawfully, willfully, and knowingly falsely make and forge, alter, utter, and publish as true a certain writing, to wit: A check on the assistant treasurer of the United States at San Francisco, State and district aforesaid, for the sum of four thousand six hundred dollars and fifty cents, payable to one H. M. Black or bearer, and purporting to be signed by one R. N. Batchelder, major and quartermaster of the United States Army, for the purpose and with the intent then and thereby to defraud the United States, as appears by the said bill of indictment duly filed by order of said court on the 21st day of February, 1882, and now remaining of record in said court, a copy of which is hereto annexed, marked Exhibit A, and made a part hereof.

That on the day and year last aforesaid an order was duly made
3 and entered by the said district court of the United States for the district of California for the issuance of a bench warrant to arrest and apprehend the said defendant, John F. Broadhead, upon the charges hereinbefore mentioned, and in pursuance of said order a bench warrant was duly issued, and the said John F. Broadhead was arrested by virtue thereof on the 27th day of March, A. D. 1882.

That afterwards, to wit, on the 19th day of September, A. D. 1882, and while the said John F. Broadhead was under arrest and in custody upon the charges hereinbefore mentioned, the said defendants, John Pilling and C. W. Alvey, as bail and sureties of the said John F. Broadhead, and in consideration of his admission to bail, duly appeared in said district court of the United States for the district of California, and thereupon did make, execute, sign, and deliver to the plaintiff herein a certain bail bond or writing obligatory, wherein they jointly and severally agreed, the said John F. Broadhead as principal and the said John Pilling and C.

W. Alvey as sureties, to owe to and to be held and firmly bound unto the United States of America, the plaintiff herein, in the full and just
4 sum of five thousand dollars, which said bail bond or writing obligatory was conditioned in substance and effect as follows: That if the said John F. Broadhead should personally appear at the district court of the United States for the district of California, to be held at the court room of said court in the city of San Francisco, on the 23d day of October, A. D. 1882, at eleven o'clock in the forenoon of that day, and afterwards whenever he might be required, to answer the said indictment and all matters and things that might be objected against him whenever the same might be prosecuted, and render himself amenable to any and all lawful orders and process in the premises and not depart the said court without leave first obtained, and if convicted should appear for judgment, and render himself in execution thereof, then the said recognizance should be void, otherwise to remain in full effect and virtue, as will more fully appear by the copy of said bail bond or writing obligatory hereto annexed, marked Exhibit B, and made a part hereof.

That the said bail bond, after being executed and acknowledged by said defendants, was, on the day and year last aforesaid, approved and
5 filed of record in said district court, and thereupon said John F. Broadhead was discharged from custody.

That said bail bond was so executed and delivered by said defendants for the purpose of procuring the release and discharge of said John F. Broadhead from custody; and upon the execution and delivery, and by reason thereof, he, the said John F. Broadhead, was released from custody.

That on the 27th day of March, A. D. 1882, the said John F. Broadhead was called upon in said district court of the United States for the district of California for arraignment, and the said John F. Broadhead thereupon appeared in person in said court with his counsel, and after waiving the reading of the indictment aforesaid, and upon being arraigned, then and there pleaded not guilty thereto.

That afterwards, on the 23d day of April, A. D. 1883, the defendant John F. Broadhead was, by the plaintiff herein, served with a notice in writing, whereby he was notified that the cause pending against him in said district court would be brought on for trial on the 17th day of July, A. D. 1883. That service of a copy of said notice of such trial was thereupon admitted by the attorney for the said defendant John F.
6 Broadhead, and the original notice thereof, with the admission of such service, was duly filed in said district court on the 24th day of April, 1883.

That at the April term, A. D. 1883, of said district court of the United States for the district of California, to wit, on the 17th day of July, A. D. 1883, the said John F. Broadhead was duly called upon in said district court for trial, and the said John F. Broadhead did, without sufficient excuse therefor, neglect to appear for such trial at said time and place under and upon said indictment.

That said defendant John F. Broadhead was duly called by said district court to appear for trial at said court on said last named day, but wholly failed and neglected so to do, and wholly failed to hold himself amenable to the orders and process of said district court as in said bail bond specified, but, on the contrary, made default therein; whereby and by reason whereof said bail bond became forfeited.

That thereupon on the said 17th day of July, A. D. 1883, the said district court made and entered an order forfeiting and estreating the said bail bond or writing obligatory.

Whereby an action hath accrued to the said plaintiff to demand
7 and have of and from the said defendants and each of them the said sum of five thousand dollars hereinbefore mentioned.

Nevertheless, the said defendants (although requested so to do) have not paid, nor hath either of them paid, the said sum of five thousand dollars, or any part thereof, to the said plaintiff, but have hitherto wholly refused and still do refuse and neglect to pay the same or any part thereof.

Wherefore plaintiff demands judgment against said defendants, and each of them, for the sum of five thousand dollars, with interest and costs of suit.

S. G. HILBORN,
United States Attorney.

8 EXHIBIT A.

United States of America, district court of the United States for the district of California.

Indictment.

At a stated term of the said court begun and holden at the city and county of San Francisco, within and for the district of California, on the first Monday of December, in the year of our Lord one thousand eight hundred and eighty-one.

The grand jurors of the United States of America within and for the district aforesaid, on their oath present: That John F. Broadhead, late of the district of California, heretofore, to wit, on the thirteenth day of January, in the year of our Lord one thousand eight hundred and eighty-two, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this court then and there being, did then and there unlawfully, willfully, and knowingly, with force and arms, feloniously falsely make and forge a certain writing, to wit, a check on the assistant treasurer of the United States at San Francisco, State and district aforesaid, purporting to be signed by R. N. Batchelder,
9 major and quartermaster of the United States Army, the same being in words and figures as follows:

Vignette

[Stanton.]

State object for which drawn: Wagons & tools.

WAR.

No. 33690] QUARTERMASTER'S DEPOT, QUARTERMASTER'S OFFICE, *San Francisco, Jan'y* 13, 1882.

[1 B. Assistant treasurer of the U. S., San Francisco, Cal.]

Pay to H. M. Black or bearer four thousand six hundred $\frac{50}{100}$ dollars. $4.600.50.

R. N. BATCHELDER,
Major & Quartermaster, U. S. A.

Engraved & printed at the Bureau Engraving & Printing.

For the purpose and with the intent, then and there and thereby, to defraud the United States.

Against the peace and dignity of the United States of America, and

contrary to the form of the statute of the said United States of America in such case made and provided.

And the grand jurors aforesaid, on their oath aforesaid, do further present: That said John F. Broadhead, late of the district of California, heretofore, to wit, on the (13) thirteenth day of January, in the year of our Lord one thousand eight hundred and eighty-two. at the city and
10 county of San Francisco, State and district of California, and within the jurisdiction of this court then and there being, did then and there unlawfully, knowingly, and willfully, with force and arms, feloniously falsely alter a certain writing, to wit, a certain check on the assistant treasurer of the United States at San Francisco, State and district aforesaid, which said check was in words and figures as follows, to wit:

WAR.

QUARTERMASTER'S.

No. 33(90.) DEPOT QUARTERMASTER'S OFFICE, *San Francisco, Jan'y* 13, 1882.

Vignette.

[1 B. Assistant Treasurer of the U. S., San Francisco, Cal.]

Pay to H. M. Black or bearer four thousand six hundred $\frac{00}{100}$ dollars.

[Stanton.] $4,600.50. R. N. BATCHELDER, *Major & Quartermaster, U. S. A.*

State object for which drawn: Wagons & tools.

Engraved & printed at the Bureau Engraving & Printing.

And which said check was then and there by said John F. Broadhead, knowingly, unlawfully, and feloniously altered by the then and there writing therein, immediately after the word "four" the words "thousand six hundred," and adding immediately after the figure "4" therein, the figures "600," thereby falsely altering said check and the amount thereof from the sum and amount of four dollars and fifty cents to the sum
11 and *and* amount of four thousand six hundred dollars and fifty cents, which said alteration was as aforesaid fraudulently made without the knowledge or consent of said R. N. Batchelder, major & quartermaster of the United States Army, whose name was and is signed to said check, and with the intent then and there and thereby to defraud the United States of the amount of said check.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America, in such case made and provided.

And the grand jurors aforesaid, on their oath aforesaid, do further present: That said John F. Broadhead, late of the district of California, heretofore, to wit, on the thirteenth day of January in the year of our Lord one thousand eight hundred and eighty-two, at the city and county of San Francisco, State and district of California, and within the jurisdiction of this court, then and there being then and there unlawfully, knowingly, willfully, and feloniously with force and arms a certain false and forged check did utter and publish as true, which said last-
12 mentioned false and forged check is in words and figures as follows, that is to say:

Vignette.

[Stanton.]

State object for which drawn: Wagons & tools.

WAR.

No. 33690.] QUARTERMASTER'S.
DEPOT QUARTERMASTER'S OFFICE,
San Francisco.

[1 B. Assistant treasurer of the U. S., San Francisco, Cal.]

Pay to H. M. Black or bearer, four thousand six hundred $\frac{50}{100}$ dollars.
$4,600.50.

R. N. BATCHELDER,
Major & Quartermaster, U. S. A.

Engraved & printed at the Bureau Engraving & Printing.

With the intent then and there and thereby to defraud the United States, he, the said John F. Broadhead at the time when he so uttered and published the said false and forged check as true, well knowing the same to be false and forged.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

PHILIP TEARE,
United States Attorney.

13 Names of witnesses examined before the said grand jury on finding the foregoing indictment: R. N. Batchelder, Frank Jones, Francis G. Bornemann.

(Endorsed:) A true bill. J. S. Doe, foreman.

Presented and filed in open court this 21st day of February, A. D. 1882.

SOUTHARD HOFFMAN,
Clerk

By A. D. GRIMWOOD,
Deputy Clerk.

14 EXHIBIT B.

UNITED STATES OF AMERICA,
District of California, ss:

Bail bond.

Be it remembered, that on this 19th day of September, in the year of our Lord one thousand eight hundred and eighty-two, before me, Southard Hoffman, a commissioner, duly appointed by the circuit court of the United States for the district of California, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the courts of the United States, pursuant to the acts of Congress in that behalf, personally appeared John F. Broadhead, as principal, and John Pilling and Charles W. Alvey, as sureties, and jointly and severally acknowledged themselves to be indebted to the United States of America in the sum of five thousand $\frac{00}{00}$ dollars, separately to be levied and made out of their respective goods and chattels, lands and tenements, to the use of the said United States.

The condition of the above recognizance is such that, whereas an indictment has been found by the grand jury of the United States for the

district of California, and filed on the 21st day of February, A. D. 1882, in the district court of the United States for said district of California, charging the said John F. Broadhead with the feloniously, &c., making and forging a certain check on the assistant treasurer U. S. at San Francisco, Cal., purporting to be signed by R. N. Batchelder, major and quartermaster of the United States Army, committed on or about the 13th day of January, A. D. 1882, to wit, at the district aforesaid, contrary to the form of the statute of the United States in such case made and provided;

And whereas the said John F. Broadhead has been required to give a recognizance with sureties in the sum of five thousand $\frac{00}{100}$ ($5,000) dollars for his appearance:

Now, therefore, if the said John F. Broadhead shall personally appear at the district court of the United States for the district of California, to be holden at the court room of said court in the city of San Francisco, on the 23d day of October, A. D. 1882, at eleven o'clock in the forenoon of that day, and afterwards whenever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said court without leave first obtained, and if convicted shall appear for judgment and render himself in execution thereof, then this recognizance shall be void, otherwise to remain in full effect and virtue.

JOHN F. BROADHEAD. [SEAL.]
JOHN PILLING. [SEAL.]
C. W. ALVEY. [SEAL.]

Acknowledged before me the day and year first above written.

SOUTHARD HOFFMAN,
Commr. U. S. Circuit Court, District of California, to take acknowledgments of bail, etc.

DISTRICT OF CALIFORNIA, *ss:*

John Pilling and Charles W. Alvey, being duly sworn, each for himself deposes and says that he is a householder in said district, and is worth the sum of five thousand ($5,000.$\frac{00}{00}$) dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

JOHN PILLING.
C. W. ALVEY.

Subscribed and sworn to before me this 19th day of September, A. D. 1882.

SOUTHARD HOFFMAN,
Commr. U. S. Circuit Court, District of California, to take acknowledgments of bail, etc.

The form and the sufficiency of the bond approved.

A. P. VAN DUZER,
Ass. U. S. Atty.

(Endorsed:) Filed this 19th day of September, A. D. 1882. Southard Hoffman, clerk U. S. dist. court, district of California.

(Endorsed:) Filed August 31, 1883. L. S. B. Sawyer, clerk.

18 United States of America, circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF America, plaintiff, *vs.* JOHN F. BROADHEAD et al., defendant. } Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city and county of San Francisco.

Summons.

The President of the United States of America, greeting, to John F. Broadhead, John Pilling, and C. W. Alvey:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons) in the office of the clerk of said court in the city and county of San Francisco, within ten days after the service on you of this summons—if served in this county; or, if served out of this county, then within thirty days—or judgment by default will be taken against you.

19 The said action is brought to obtain a judgment against you for the sum of five thousand dollars, together with interest thereon and costs of action, alleged to be due plaintiff by reason of the breach of a certain bond executed by defendants to plaintiff and conditioned for the appearance of said John F. Broadhead before the district court of the United States for the district of California, whenever required, to answer an indictment pending against him therein; and if you fail to appear and plead, answer, or demur as herein required, your default will be entered and the said plaintiff will take judgment against you for said sum of $5,000, together with interest thereon as aforesaid and the costs of this action.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 31st day of August, in the year of our Lord one thousand eight hundred and eighty-three and of our Independence the 108th.

[SEAL.] L. S. B. SAWYER,
Clerk.

20 (Endorsed:) United States marshal's office, District of California.

I hereby certify that I received the within writ on the 7th day of September, 1883, and personally served the same on the 13th day of September, 1883, by delivering to and leaving with John Pilling, and on the 1st day of November, 1883, by delivering to and leaving with C. W. Alvey, said defendants named therein, personally, at the city and county of San Francisco, in said district, copy thereof, together with a copy of the complaint certified to by L. S. B. Sawyer, clerk circuit court, attached thereto.

I furthermore certify that after diligent search I am unable to find John F. Broadhead, said defendant, in said district. M. M. Drew, U. S. marshal, by C. H. Peterson, deputy. San Francisco, November 1st, 1883. Filed Nov'r 1, 1883. L. S. B. Sawyer, clerk.

21 United States circuit court, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
JOHN F. BROADHEAD, ET AL.

Demurrer of Deft. Pilling.

Now comes the defendant John Pilling, and demurs to the complaint of plaintiff, and for grounds of demurrer shows:

1st. That said complaint does not state facts sufficient to constitute a cause of action.

2nd. That said complaint is ambiguous, uncertain, and untelligible in this, to wit:

That it does not appear that the defendant John F. Broadhead was ever notified to appear in the action pending against him on the 17th day of July, 1883, or that he ever failed to appear when required to answer the indictment mentioned in the complaint.

WM. & GEO. LEVISTON,
Attorneys for Defendant.
JOHN PILLING.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

WM. LEVISTON,
Counsel for said Deft.

22 (Endorsed:) Received copy of within this 7th day of Dec., 1883. S. G. Hilborn, per Gunther, U. S. at'ty, att'y for plaintiff. Filed Dec. 7th, 1883.

23 At a stated term, to wit, the February term, A. D. 1884, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court room in the city and county of San Francisco, on Monday, the 3d day of March, in the year of our Lord one thousand eight hundred and eighty-four.

Present, the honorable Lorenzo Sawyer, circuit judge.

THE UNITED STATES
vs.
J. F. BROADHEAD ET AL. } No. 3126.

Order overruling demurrer.

This cause, heretofore argued and submitted to the court for consideration and decision upon the demurrer of defendant Pilling, having been duly considered, it is ordered that said demurrer be, and the same is hereby, overruled, with leave to the defendant Pilling to answer in ten days on the payment of twenty dollars.

24 I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 12th day of September, A. D. 1884.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON,
Deputy Clerk.

25 United States circuit court, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
JOHN F. BROADHEAD, JOHN PILLING, AND C. W. Alvey, defendants.

Answer of def't Pilling.

Now comes the defendant John Pilling (impleaded with the defendants John F. Broadhead and C. W. Alvey), by Wm. and Geo. Leviston, his attorneys, and for answer to the complaint of plaintiff herein denies that he is or ever was indebted to the plaintiff in the sum of five thousand dollars, or in any sum whatever.

He denies that the said John F. Broadhead was on the 19th day of September, 1882, or at any other time except prior to the 20th day of April, 1882, and since the 29th day of January, 1883, under arrest or in custody upon the charge mentioned in the complaint herein, and he denies that this defendant, or his co-defendant, C. W. Alvey, or either of them, at any time while the said Broadhead was under arrest or in custody upon the said charges, did, as bail bond or sureties of said Broadhead,
26 or in consideration of his admission to bail, make, execute, or deliver any bail bond whatsoever.

And he denies that the said John F. Broadhead was discharged from custody on the execution or acknowledging of a bail bond by the defendant or his co-defendants, or of either or any of them.

And he denies that the bail bond which was executed and delivered by the defendants herein was for the purpose of procuring the release or discharge of the said Broadhead, or that upon the execution or delivering of the said bond, or by reason thereof, the said John F. Broadhead was released from custody. On the contrary, this defendant avers:

That on the 20th day of April, 1882, and while the defendant John F. Broadhead was under arrest and in custody upon the charges mentioned in said complaint, and an order was duly made by the district court of the United States for the district of California, ordering that the said John F. Broadhead be allowed to deposit in said court the sum of $5,000 in U. S. gold coin in lieu of a bail bond, and that upon such deposit being made that the said Broadhead be released from custody, and that
27 said deposit be held in lieu of bail bond for the appearance of said Broadhead to answer the matters charged against him by the indictment mentioned in the complaint herein.

That the said Broadhead thereupon and on the said day deposited in said court the sum of $5,000 in U. S. gold coin and was thereupon dis-

charged from custody, and said sum was held by said court as security for the appearance of said Broadhead to answer the matters charged against him by the aforesaid indictment.

And this defendant further avers that at the time he executed, acknowledged, and delivered the bond mentioned in and annexed to said complaint the said Broadhead was not under arrest nor in custody upon the charges mentioned in the complaint, or upon any charges whatsoever, and the execution and delivery of the said bond was not in consideration of the admission of said Broadhead to bail or for the purpose of procuring the release or discharge of the said Broadhead from custody, nor was the said Broadhead by reason thereof released from custody, but the said Broadhead was then free and at large, nor had he been required to file any other or additional bond, and there was no consideration for the executing or delivering by this defendant of the bond aforesaid.

28 And for a further and separate answer and defense this defendant avers that the plaintiff ought not to have or maintain this action because, as defendant avers:

That on the 20th day of April, 1882, and while the defendant John F. Broadhead was under arrest and in custody upon the charges mentioned in said complaint, and an order was duly made by the district court of the United States of the district of California, ordering that the said John F. Broadhead be allowed to deposit in said court the sum of $5,000 in U. S. gold coin, in lieu of a bail bond, and that upon such deposit being made that the said Broadhead be released from custody, and that said deposit be held in lieu of bail bond for the appearance of said Broadhead to answer the matters charged against him by the indictment mentioned in the complaint herein.

That the said Broadhead thereupon and on the said day deposited in said court the sum of $5,000 in U. S. gold coin, and was thereupon discharged from custody, and said sum was held by said court as security for the appearance of said Broadhead to answer the matters charged against him by the aforesaid indictment.

29 That at the time this defendant made and executed the bond mentioned in and annexed to the complaint herein, the said sum of $5,000 was still on deposit in the said district court as security for the appearance of said Broadhead to answer the matters charged against him by said indictment.

That afterwards and on the 19th day of September, 1882, the said district court, without the consent or knowledge of the defendant, ordered that the said sum of $5,000, which was deposited as aforesaid as security for the appearance of said Broadhead, be surrendered and paid over to R. H. Lloyd, the person who had deposited said sum on behalf of said Broadhead; and said sum was afterwards, to wit, on the said last named day, without the knowledge or consent of this defendant, surrendered and paid to said R. H. Lloyd, whereby this defendant was released from the obligation of his said bond.

And for a further and separate answer this defendant avers that said plaintiff ought not to have or maintain this action against him because, as he avers:

That after the said John F. Broadhead had been arraigned and pleaded "not guilty," as stated in the complaint herein, and after said Broadhead

had been released as above stated on depositing the sum of
30 $5,000 in lieu of bail bond, and after this defendant had made and executed the bond mentioned in and annexed to the complaint herein, this defendant was on the 23d day of January, 1883, notified by the United States district attorney to have and produce the said John F. Broadhead in the United States district court room on the 25th day of January, 1883.

That the trial of said Broadhead on the indictment mentioned in the complaint was set for the last named date. That the said trial was continued to the 29th day of January, 1883, and the said Broadhead was on said last named day called on in open court by the said district court to answer the said indictment, and failed to answer, appear, or respond thereto; and afterwards, and on the day last above named, an order was made by the said district court in open court that a bench warrant issue for the arrest of said Broadhead forthwith, and immediately thereon, and on the last named day, an alias bench warrant was issued by and out of said district court addressed to the United States marshal for the district of California, commanding him to forthwith arrest said Broadhead and bring
31 him before said court; and afterwards and on the said last named day, under and by virtue of said warrant, the said marshal arrested the said Broadhead and brought him before and into the custody of the said district court, and surrendered him in open court to answer the indictment set forth in the complaint herein; and that afterwards and on the last named day the said Broadhead, without the knowledge or consent of this defendant, was by the said district court released from custody, arrest, and imprisonment.

And for a further and separate answer this defendant avers that said plaintiff ought not to have or maintain this action against him, because, as he avers:

That after the said John F. Broadhead had been arraigned and pleaded not guilty as stated in the complaint herein, and after said Broadhead had been released as above stated on depositing the sum of $5,000 in lieu of bail bond, and after this defendant had made and executed the bond mentioned in and annexed to the complaint herein, this defendant was on the 23d day January, 1883, notified by the United States district attorney to have and produce the said John F. Broadhead in the United States district court-room on the 25th day of January, 1883.

That the trial of said Broadhead on the indictment mentioned in the complaint was set for the last-named day. That the trial was
32 continued to the 29th day of January, 1883, and the said Broadhead was on the said last-named day called on in open court by the said district court to answer the said indictment and failed to answer, appear, or respond thereto, and afterwards, and on the day last above named an order was made by the said district court in open court that a bench warrant issue for the arrest of said Broadhead forthwith, and immediately there and on the last-named day an alias bench warrant was issued by and out of said district court addressed to the United States marshal for the district of California, commanding him to forthwith arrest said Broadhead and bring him before said court; and afterwards, and on the said last-named day under and by virtue of said warrant the said marshal arrested the said Broadhead and brought him before and into

the custody of the said district court and surrendering him in open court to answer the indictment set forth in the complaint herein; and that afterwards and on the last named day the said Broadhead without the knowledge or consent of this defendant was by the said district court released from custody, arrest, and imprisonment, and thereby without the privity, procurement, knowledge, or consent of this defendant, the said Broadhead then and there escaped from imprisonment, from the custody of said marshal, said court, said plaintiff, and from the custody of the
33 law. Wherefore said defendant prays to be hence dismissed with costs.

WM. & GEO. LEVISTON,
Att'ys for Def't John Pilling.

(Endorsed:) Received copy of within this 18th day of March, 1884. S. G. Hilborn, U. S. attorney, att'y for plaintiff. Filed March 18, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

34 At a stated term, to wit, the term, A. D. 18 of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on the day of in the year of our Lord one thousand eight hundred and .

Present, the honorable Lorenzo Sawyer, circuit judge.

THE UNITED STATES O' AMERICA
vs.
'OHN F. BROADHEAD ET AL. } No 3126.

Stipulation waiving jury.

It is hereby stipulated and agreed that a jury trial in the above-entitled cause is hereby waived.

S. G. HILBORN,
U. S. Att'y, Att'y for Pl'ff.
WM. & GEO. LEVISTON,
Att'ys for Def't Pilling.

(Endorsed:) Filed Sept. 25, 1884. L. S. B. Sawyer, clerk.

35 At a stated term, to wit, the July term, A. D. 1884, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on Friday, the 12th day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Present, the honorable Lorenzo Sawyer, circuit judge.

THE UNITED STATES OF AMERICA
vs.
J. F. BROADHEAD ET AL. } No. 3126.

Findings.

This cause having come on regularly for trial on the 5th day of September, A. D. 1884, before the court sitting without a jury, a trial by jury

having been duly waived, Carroll Cook, esq., assistant district attorney, appearing on behalf of the United States, and Wm. Leviston and T. D. Riordan, esq'rs, appearing for behalf of the defendants, and the evidence, oral and documentary, having been introduced and closed, and the cause having been submitted to the court for consideration and decision, the court being sufficiently advised, now finds the issues of fact in favor
36 of the defendants, and as a conclusion of law that the defendants are entitled to judgment.

Let judgment be entered for defendants.

LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed September 12, 1884. L. S. B. Sawyer, clerk.

37 United States of America, circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
JOHN F. BROADHEAD, JOHN PILLING (answered), C. W. Alvey (was served but never appeared or answered), defendants. } No. 3126.

Judgment.

This cause having come on regularly for trial on the 5th day of September, 1884, being a day in the July, 1884, term of said court, before the court sitting without a jury, a trial by jury having been waived by written stipulation of counsel for the respective parties hereto, duly filed with the clerk of this court, Carroll Cook, esq., assistant U. S. attorney appearing on behalf of the United States, plaintiff, and William Leviston and T. D. Riordan, esqrs., on behalf of defendants, and documentary evidence having been introduced on the part of the United States, and a witness on the part of the defendants having been sworn and examined, and the evidence being closed, the cause after arguments of counsel having been submitted to the court for consideration and decision, and the court
38 having filed its findings in writing and ordered that judgment be entered in accordance therewith:

Now, therefore, by virtue of the law and the findings aforesaid it is considered by the court that the United States, plaintiff, take nothing by this action, and that the defendants go hereof without day.

Judgment entered this 12th day of September, 1884.

L. S. B. SAWYER,
Clerk.

(Endorsed:) I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 12th day of September, A. D. 1884. [Seal.] L. S. B. Sawyer, clerk. Filed September 12, 1884. L. S. B. Sawyer, clerk.

39 United States of America, circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
J. A. BROADHEAD ET AL. } No. 3126.

Certificate to judgment-roll.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the therein entitled action.

Witness my hand and the seal of said circuit court this 12th day of September, A. D. 1884.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
B' F. D. MONCTON,
Deputy Clerk.

(Endorsed:) Judgment-roll. Filed September 12, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

40 In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF and plaintiff in error,
vs.
JOHN F. BROADHEAD, JOHN PILLING, AND C. W. ALVEY, defendants and defendants in error.

I, L. S. B. Sawyer, clerk of said circuit court, do hereby certify that the foregoing thirty-nine written pages, numbered from one to 39, inclusive, are a full, true, and correct copy of the record, and of all proceedings in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court at San Francisco, California, this 18th day of May, A. D. 1885.

[SEAL.] L. S. B. SAWYER, *Clerk*.

41 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth judicial circuit, in and for the district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between the United States of America, plaintiff and plaintiff in error, and John F. Broadhead, John Pilling, and C. W. Alvey, defendants and defendants in error, a manifest error hath happened, to the great damage of the said plaintiff and plaintiff in error, as by its complaint appears, and it

being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 24th day of March, in the year of our Lord one thousand eight hundred and eighty-five and of the Independence of the United States the one hundred and ninth.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Circuit Court, District of California.

The above writ of error is hereby allowed.

LORENZO SAWYER,
U. S. Circuit Judge.

42 *The answer of the judges of the circuit court of the United States for the district of California.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America, within mentioned, at the day and place within, contained in a certain schedule to this writ annexed, as within we are commanded.

By the court.

L. S. B. SAWYER,
Clerk.

(Indorsed:) United States Supreme Court. United States of America, pl'ff in error vs. John F. Broadhead et al., def'ts in error. Writ of error. Filed April 22d, 1885. L. S. B. Sawyer, Clerk U. S. circuit court, district of California.

43 UNITED STATES MARSHAL'S OFFICE,
District of California:

I hereby certify that I received the annexed citation on the 22d day of April, 1885, and personally served the same on the 24th day of April, 1885, by delivering to and leaving with William Leviston, attorney for said defendants named therein, personally, at the city and county of San Francisco, in said district, a certified copy thereof.

San Francisco, April 24th, 1885.

M. M. DREW,
U. S. Marshal,
By C. H. PETERSON,
Deputy.

44 UNITED STATES OF AMERICA, *ss:*

To John F. Broadhead, John Pilling, and C. W. Alvey, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1885, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the ninth circuit, district of California, wherein the United States of America is plaintiff and plaintiff in error and you are defendants and defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Lorenzo Sawyer, judge of the circuit court of the United States, ninth circuit, district of California, this 22d day of April, A. D. 1885, and of the Independence of the United States the one hundred and ninth.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge.

45 (Indorsed:) In the Supreme Court of the United States. The United States of America, pl'ff in error, vs. John F. Broadhead et al., def'ts in error. Citation. Filed April 25, 1885. L. S. B. Sawyer, clerk U. S. circuit court, district of California.

(Indorsement on cover:) No. 528. The United States, plaintiff in error, vs. John F. Broadhead, John Pilling, and C. W. Alvey. California C. C. U. S. Filed June 5th, 1885.

124-212

FILED
APR 1 1888
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, PLAINTIFF IN error,
vs.
JOHN T. BROADHEAD AND OTHERS. } No. 233.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Brief for the Plaintiff in Error.

WM. A. MAURY,
Assistant Attorney-General.

44 UNITED STATES OF AMERICA, *ss:*

To John F. Broadhead, John Pilling, and C. W. Alvey, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1885, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the ninth circuit, district of California, wherein the United States of America is plaintiff and plaintiff in error and you are defendants and defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Lorenzo Sawyer, judge of the circuit court of the United States, ninth circuit, district of California, this 22d day of April, A. D. 1885, and of the Independence of the United States the one hundred and ninth.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge.

45 (Indorsed:) In the Supreme Court of the United States. The United States of America, pl'ff in error, vs. John F. Broadhead et al., def'ts in error. Citation. Filed April 25, 1885. L. S. B. Sawyer, clerk U. S. circuit court, district of California.

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vs.
JOHN T. BROADHEAD AND OTHERS. } No. 233.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Brief for the Plaintiff in Error.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, PLAINTIFF IN error,
vs.
JOHN F. BROADHEAD AND OTHERS. } No. 233.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Brief for the Plaintiff in Error.

This is an action to enforce the obligation of a certain bail-bond entered into by the defendants. The penalty of the bond is $5,000, which is demanded, with interest.

The complaint alleges that the defendant, John F. Broadhead, being indicted for forgery in the United States district court for the district of

California, was arrested on a bench warrant the 27th March, 1882, and afterwards, to-wit, the 19th September, 1882, was discharged from arrest, and in lieu of his body the bond in suit was accepted.

The condition of the bail-bond is as follows:

> That if the said John F. Broadhead should personally appear at the district court of the United States for the district of California, to be held at the court-room of said court in the city of San Francisco on the 23d day of October, A. D. 1882, at 11 o'clock in the forenoon of that day, and afterwards whenever he might be required, to answer the said indictment and all matters and things that might be objected against him whenever the same might be prosecuted and render himself amenable to any and all lawful orders in the premises and not depart the said court without leave first obtained, and if convicted should appear for judgment and render himself in execution thereof, then the said recognizance should be void, otherwise to remain in full effect and virtue, * * *

It is averred that Broadhead's trial under said indictment was fixed for the 17th of July, 1883, and that written notice of the fact was given the accused's counsel, and that on the said day the accused, although called, failed to appear, and that thereuopon the said bail-bond was duly forfeited and estreated.

Process was served on Pilling and Alvey (p. 7), but Pilling alone appeared and made defense.

Answer of Pilling.

He denies that he is or ever was indebted, etc., or that Broadhead was under arrest at the time the bond was given, or that the bond was given to procure his release from custody, or that he was released on the execution and delivery of the bond, for that on the 20th April, 1882, and while the accused was under arrest upon the charges named in the complaint, the said district court ordered that the accused, Broadhead, be allowed to deposit $5,000 in gold, in the place of a bail-bond, and that such deposit was thereupon made and the accused discharged from custody; that while the accused was thus at large, and in the absence of any order requiring him to file any other or additional bond, the bond in suit was given, and so that there was no consideration for said bond.

And, for a further defense, it is urged that at the time the bond in suit was given the $5,000 was

still held as security for the accused's appearance to answer said indictment, and that afterwards, on the 19th September, 1882, the said district court, without the consent or knowledge of the defendant, ordered the $5,000 to be paid over to R. H. Lloyd, the person who had deposited it, and that such payment was, in fact, made on said day, whereby the defendant was released from the obligation of the said bond.

And, for a further defense, it is said that after the bond in suit was given, the defendant was notified to have the accused in court on the 25th January, 1883, which time was extended to 29th January, 1883, when the accused was called in court and failed to appear, whereupon a bench-warrant was issued, on which the accused was brought into court; and that afterwards, on the same day, the accused was released from custody by the said court without the defendant's knowledge or consent.

And, for a further defense, it is claimed that the state of facts on which the next preceding defense is founded amounted to an escape of the

accused from the custody of the marshal (pp. 9–12).

There was a waiver of the trial by jury by stipulation (p. 12).

On the 5th September, 1884, the trial was commenced, and on the 12th of that month the court found "the issues of fact in favor of the defendants, and, as a conclusion of law, that the defendants are entitled to judgment" (pp. 12, 13).

On the same day a judgment in due form was entered on said finding (p. 13).

Assignment of Error.

The error assigned is that the court below should not have entered judgment on its finding, the issues tried being all immaterial, but, proceeding on the confession of the plaintiffs' cause of action in the answer, should have entered judgment for the amount claimed *non obstante* the finding.

Argument.

The first defense amounts to the plea of *nil debet*, and must be entirely ignored, for no such

plea is permissible in the case of an obligation under seal or of record, for the defendant in the one case must plead *non est factum*, or in the other *nul tiel record*, or some equivalent of those pleas.

Even under the liberal procedure of California the defendant's denial "that he is or ever was indebted to the plaintiff in the sum of $5,000 or in any sum whatever" does not amount to a denial that he executed the bond set out in the complaint, but is a sham and irrelevant denial. (1 Civil Code of Procedure, p. 364, § 23, note.)

The next defense proceeds on the idea that there was no valid bail-bond because the accused (Broadhead) had already been discharged from custody on the pledge or deposit of $5,000 in gold when the bond was executed.

Undoubtedly the first idea of bail was that they were "in the nature of gaolers to the defendant" (Co. Litt., 265*b*, note 215). Says Lord Coke: "And thereupon we say, when a man upon surety is delivered out of prison, *traditur in*

ballium, he is delivered into bayle, that is, into their safe-keeping or protection from prison." (Co. Litt, 61*b*).

But, we take it, that to use the term *bail* in that primitive sense at the present day is to revive a meaning that has long been obsolete.

In the modern sense, *bail* means simply *security* for a party's appearance according to the exigency of the condition of the bail-bond, with the right in the *bail* to command the power of the State to arrest such party and surrender him into the custody of the law.

Undoubtedly, in almost every case, the effect of giving bail is a discharge from custody, but we venture to say that this effect is not necessary to the validity of the proceeding. Section 1281 of the Penal Code of California seems in entire accord with this theory. It provides:

> Upon the allowance of bail and the execution of the undertaking, the magistrate must, *if the defendant is in custody*, make and sign an order for his discharge, upon the delivery of which to the proper officer the defendant must be discharged.

It was therefore hardly to be expected that so rigorous a view of the law of bail as the answer presents would be taken in California.

As no order of court is referred to in the answer, requiring additional security or the substitution of the ordinary bail for the money deposited, it must be presumed that the substitution took place by agreement, and that the appearance and acknowledgment of bail before the commissioner were for the purpose of giving effect to such agreement. It would not be surprising if the accused's friend who made the deposit desired to have the use of his money, which was lying dead in the hands of the law, or if the accused showed his gratitude by furnishing regular bail, and thus releasing the deposit. Indeed, it seems that no other construction can be put upon the facts stated in the answer.

But we submit that the appearance of Broadhead, the accused, before the United States commissioner, an officer empowered to admit to bail, for the purpose of giving bail, may be properly regarded as a surrender of his body into the custody of the law.

It is unnecessary to dwell on the next defense, that the release of the deposit of $5,000 was a detriment to the defendant as surety, and, *ipso facto*, discharged the obligation incurred by the bail-bond, for the position is clearly not tenable. This court has held that the equitable principle of subrogation has no application to bail (*United States* v. *Ryder*, 110 U. S. R., 730), and, therefore, the defendant could not have acquired a right of recourse against the $5,000 deposit had he been forced to pay the amount of the bond.

The next defense is that the defendant was notified to have the accused in court, to stand his trial, on the 29th January, 1883, on which day the accused was called, but appeared not; that he was then brought in on a bench-warrant, and was either released or escaped while in the marshal's custody.

Strangely enough, it is claimed that this discharged the defendant, whose liability on the bail-bond had already become fixed by the failure of the accused to appear on the day appointed for his trial. This failure was a clear breach of the condition of the bond.

The defenses urged in the answer being frivolous, or certainly immaterial, and the answer containing explicit admissions by the defendant that he executed the bond in suit, and that the condition of the bond was broken, the facts are at hand for the entry of a judgment for the plaintiff *non obstante* the findings for the defendant on the immaterial issues. To make an award of repleader would be useless circuity, and lead to no good end, as it is apparent the defendant has no valid defense.

It may be proper to add that the law of California declares that no judgment in a court of that State "shall draw interest at a rate to exceed seven per cent. per annum" (Civil Code, §1920.)

It is submitted that the judgment should be reversed.

WM. A. MAURY,
Assistant Attorney-General.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 235.

HENRY O. JONES AND JOHN JORT, APPELLANTS,

vs.

WALTER CRAIG.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JUNE 11, 1885.

The defenses urged in the answer being frivolous, or certainly immaterial, and the answer containing explicit admissions by the defendant that he executed the bond in suit, and that the condition of the bond was broken, the facts are at hand for the entry of a judgment for the plaintiff *non obstante* the findings for the defendant on the immaterial issues. To make an award of repleader would be useless circuity, and lead to no good end, as it is apparent the defendant has no valid defense.

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Wm. A. Maury,
Assistant Attorney-General.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 2, 1887.

1 Pleas before the Hon. Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, within the eighth judicial circuit, sitting in the circuit court of the United States for said district, at the term of January, A. D. 1885.

Be it remembered that on the 29th day of December, 1883, a bill was filed in the office of the clerk of said circuit court, which said bill is in words and figures following, to wit:

STATE OF NEBRASKA:

In the Circuit Court of the United States for the District of Nebraska.
In Chancery.

HENRY O. JONES and JOHN JORT *vs.* WALTER CRAIG.

To the judges of the circuit court for district of Nebraska:

The plaintiffs, Henry O. Jones and John Jort, complaining unto your honors, showeth: That they, the said plaintiffs, are residents and citizens of the state of Nebraska, and that the defendant, Walter Craig, is a citizen and resident of the State of Ohio; and, further complaining, show to your honors that on the 2nd day of June, 1857, one William Finney was the owner in fee-simple of the following-described tract of land situate in the county of Douglas and State of Nebraska, to wit: The southwest quarter of section four (4), in township fifteen (15) north, of range twelve (12) east, and that on said last-mentioned day, being desirous of effecting a loan of money upon said land, made an arrangement with the said Walter Craig and also John McCormick, George T. Hogg, & Wm. Hogg, all of whom were partners doing business under the firm name of John McCor-
2 mick & Co., in Omaha, whereby he obtained a loan for the sum of two hundred and eighty-two dollars, and executed and delivered to said firm his promissory note for that amount, payable June 2d, 1858, one year after the date thereof, with interest at the rate of ten per cent. per annum, and in order to secure the payment of the said sum of money executed and delivered to the said Craig an absolute deed of the said premises, and upon the same day, June 2, 1857, and as a part of the same transaction the said firm of John McCormick & Co., acting as the agents of said Craig (the said Craig being the person who advanced the said sum of money in said note mentioned, to the said Finney, and being the only person interested therein) executed and delivered to the said Finney a defeasance or bond as by the statute of the then Territory of Nebraska was provided, in the words and figures, following, to wit:

"John McCormick & Co., of the county of Douglas and Territory of Nebraska, agree to have sold and conveyed by deed unto William Finney, of Douglas county, Nebraska Territory, the following-described tract of land, in the county of Douglas, Territory aforesaid: The southwest quarter of section four (4), in township fifteen (15) north, of range twelve (12) east, in the Omaha land district, on condition of said William Finney paying promptly, time being the

essence of the contract, a certain promissory note, given June 2d, 1857, calling for two hundred and eighty-two dollars, due June 2d, 1858, if said note is not paid when due, we are privileged to enter upon and occupy said land or to allow the said Wm. Finney to do so at our option. It is understood by the parties hereto that the said William Finney is to pay all taxes that may acrue on said land, and is not to cut the timber except for farming purposes; then this bond to be carried into fully effect, provided no pre-emption right attach upon and vacate the present entry of said land.

Omaha City, N. T., June 2d, 1857.

(Signed) JOHN McCORMICK & CO."

The said deed *to* the said Finney to the defendant, Craig, was recorded in the record of deeds of Douglas county on the day of its execution, to wit, June 2, 1857, but the said bond or defeasance was not so recorded until January 6th, 1864, nearly seven years after its execution; that the transaction between the said parties was intended to be, and was so treated by them, and by the law of said place of its execution, as a mortgage, and nothing more.

That the said firm of John McCormick & Co. had no interest in said transaction, but the sole and only parties interested therein were the said defendant and the said Finney.

The said Finney remained in the possession and title to said premises (he having received the title by patent from the United States long prior to said transaction) until July 3d, 1857, when, for a valuable consideration, to wit, $500.00 to him in hand paid by Nathaniel Ervin, he, the said Finney, conveyed the said land by warranty deed to the said Ervin, without any notice on the part of said Ervin of the mortgage held upon the said land by the defendant, Craig, the said bond of defeasance not being recorded, so as to make the same effective.

Afterwards, to wit, September 14th, 1859, the defendant, with others, the members of said firm of McCormick & Co., filed their bill of complaint in the district court of Douglas county against the said Finney and Ervin, alleging the facts of the said transaction, as hereinbefore set forth, of the execution of the said deed, defeasance, and note, and praying "that on the final hearing the said deed to
4 the said Walter Craig and bond of defeasance thereof may be decreed a mortgage and a lien as such upon said premises from the day of the date thereof and prior to the lien or claim of the said Ervin, and that an account may taken under the direction of this (said) court of what it (was) due," and "that said mortgaged premises may be sold under the decree of this (said) court and the proceeds thereof applied to the payment of the said debt." The said parties so as aforesaid made defendants were served with process, and the answer of the said Ervin coming in and filed in said cause, it was therein disclosed that he, the said Ervin, had no knowledge of the lien or claim by way of mortgage upon said premises of the said Craig or other parties, and that he, the said Ervin, was a *bona fide* purchaser of said premises for value, the said Craig and others

as aforesaid dismissed said cause out of said court, and have never sought to further prosecute their said cause of action, or in any manner to secure a lien upon said premises for the said alleged indebtedness. Said cause of action was so dismissed out of said court on the 8th day of July, 1861.

Said alleged indebtedness has never in any manner been renewed or extended by said parties and all claim by reason thereof has long since been abandoned, and the said Craig, from the date of the dismissal of said cause of action aforesaid until June, 1880, has never made any claim to said premises, when upon said last date aforesaid he commenced an action in this court, upon the law side thereof, in ejectment against the plaintiff Jones, claiming to be the owner of the fee in said premises by virtue of the said deed from the said Finney to him, the said Craig, which was executed and delivered in the manner hereinbefore set forth and in no other manner and for no purpose except to secure the payment of the said
5 alleged indebtedness, which said suit is now pending in this court.

The plaintiffs further represent to the court that the said Craig never had any interest in said premises, except by reason of said mortgage, which mortgage, as well as the alleged indebtedness sought to be secured thereby, has long since and is now barred by the statute of limitations of said State, and any and all claims by reason of said mortgage transaction upon said premises have become extinct by reason of the lapse of time aforesaid, and the said deed and bond of defeasance are a cloud upon title to said premises.

The plaintiffs further show to the court that the said Ervin continued to own and control the said premises from the time of his said purchase from Finney as aforesaid until December 11th, 1875, when the plaintiff, Henry O. Jones, for a good and valuable consideration, purchased the same and at once went into possession thereof and so continued until the 1st day of May, 1882, — he sold the premises to the plaintiff Jort for a valuable consideration, with covenants of warranty, receiving from the said Jort part payment in cash and a mortgage upon said premises for the remainder of said purchase-money and now holds said mortgage.

And the plaintiff, John Jort, is a *bona fide* owner of said premises and the acts, doings, and claims of the defendant are contrary to equity and good conscience and tend to the manifest wrong and injury of the plaintiffs in the premises.

In consideration whereof, and as such as the plaintiffs can only have adequate relief in a court of equity, where such matters are properly cognizable and relievable. To the end, therefore, that the — Walter Craig may hereunto answer (under oath being ex-
6 pressly waived), and upon the final hearing it may be decreed that the transaction between the said John McCormick & Co., Walter Craig, and William Finney was the simply borrowing of money, and the giving of a mortgage to secure the payment thereof, and that said deed, note, and the bond of defeasance was a mortgage, and that all rights, claims, interest, and demand of the defendant by reason thereof was, at the time of the purchase by the

said Jones and ever since has been, barred by the statute of limitation, and that the defendant Craig took no title in or to said premises by reason of said deed, and that plaintiffs and their grantors were *bona fide* purchasers for value of said premises, and that the plaintiff, John Jort, now holds the legal title unencumbered by any lien or claim of the said Craig by reason of his said mortgage, and for such other relief, with costs, as to the court shall seem meet.

May it please the court to grant unto the plaintiffs the most gracious writ of subpœna, to be directed to the said Walter Craig, thereby commanding him at a certain day and under a certain pain therein, to be named personally, to be and appear before your honors in this court, and then and there full and perfect answer make to all and singular the premises, and further, to stand to perform and abide such further order, direction, and decree therein as to your honors shall seem meet

And the plaintiffs will ever pray, &c.

CHAS. H. BROWN,
Att'y for Pl'ffs.

G. W. AMBROSE,
Of Counsel.

UNITED STATES OF AMERICA, }
District of Nebraska, } *ss:*

Henry O. Jones, being duly sworn, says that he is one of the plaintiffs in the above cause, and that the matters and things
7 stated in the foregoing bill of complaint are true to the personal knowledge of affiant, except such matters as are stated upon information and belief, and as to those matters he believes them to be true.

HENRY O. JONES.

Sworn to before me and subscribed in my presence this 29th day of Dec., 1883.

ELMER D. FRANK, *Clerk.*

Upon the back of said bill appear endorsements in words and figures following, to wit: No. 193—H. Henry O. Jones *et al. vs.* Walter Craig. Filed Dec. 29, 1883. Elmer D. Frank, clerk. Chas. H. Brown & G. W. Ambrose, att'ys.

Thereupon afterwards, to wit, on the 9th day of May, 1884, demurrer to complaint of Henry O. Jones *et al.* was filed in said case, which said demurrer is in words and figures following, to wit:

Demurrer to Complaint of Henry O. Jones et al.

In U. S. Circuit Court, District of Nebraska.

HENRY O. JONES *et al.*, Complainants,

vs.

WALTER CRAIG, Respondent.

This respondent, by protestation not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainants hath not by *his* said bill made such a case as entitles him in a court of equity to any relief from or against the respondent touching the matters contained in the said bill or any of such matters.

8 Wherefore and for divers other good causes of demurrer appearing in said bill of complaint this respondent doth demur to said bill, and to all matters and things therein contained, and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

I certify that, in my opinion, the foregoing demurrer of Walter Craig, respondent, to the bill of complaint of Henry O. Jones *et al.*, complainants, is well founded in law and proper to be filed in the above cause.

W. J. CONNELL,
Counsel for Respondent.

UNITED STATES OF AMERICA, *District of Nebraska,* } *ss:*

William J. Connell, being first duly sworn, deposes and says that he is attorney for said Walter Craig, respondent, who is now absent from this State; that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

W. J. CONNELL.

Subscribed in my presence and sworn to before me this 9th day of May, 1884.

E. S. DUNDY, JR.,
Clerk U. S. District Court.

Upon the back of said demurrer appear endorsements in words and figures following, to wit: No. 193—H. In United States circuit court, district of Nebraska. Henry O. Jones *et al. vs.* Walter Craig, respondent. Demurrer to complaint of Henry O. Jones
9 *et al.* Filed May 9, 1884. Elmer D. Frank, clerk. Wm. J. Connell, att'y for respondent.

Thereupon, afterwards, to wit, on the 24th day of May, 1884, an order sustaining demurrer was filed in said case, which said order sustaining demurrer is in words and figures following, to wit:

JONES *vs.* CRAIG.

I hold that this defendant has a good cause of action in the other case of Craig *vs.* Jones, and that he would be entitled to a judgment for the premises in dispute if permitted to prosecute the suit last named. The deed on which Craig basis his right to recover was given to secure the payment of money, and is, therefore, in effect a mortgage, which the plaintiff seeks to have declared as such, in order to defeat the operation of the deed or mortgage. The mortgage has not been paid, but it is claimed that the statute of limitations bars the cause of action, and, therefore, the claim to the property is worthless. If Craig had brought suit to foreclose the mortgage, then such a defense could have been successfully interposed; but he does not seek to foreclose what is supposed to be a mortgage, but what is, in fact on its face, a deed absolute. He seeks to recover possession of the land to which he would be entitled, unless his deed shall be declared to be a mortgage. Before this plaintiff can deprive him of the right to proceed on the law side of the court to recover possession of the land he, plaintiff, must do or offer and be ready to do what equity requires in such and similar cases—that is, he must pay off the mortgage or bring the money into court for such purpose and pay the legal taxes, with interest, which the other party has paid. The bill ought to state readiness of comp. to do this. As it does not do so it is defective and the demurrer must be sustained.

If the plaintiff will amend bill and bring into court proper amount of money to redeem and pay taxes, all of same to bear interest from time money was due, and int. on taxes from date of payment at present rate of interest, then perpetual injunction can be allowed. Costs of both suits to abide further order.

D.

Upon the back of said order sustaining demurrer appear endorsements in words and figures following, to wit: No. 193—H. Jones *vs.* Craig. Order sustaining demurrer. Filed May 24, 1884. Elmer D. Frank, clerk.

Thereupon, afterwards, at the May term of said court, on the 24th day of May, 1884, the following proceedings were had as appears of record, on folio 389, Journal "I," of said court, to wit:

HENRY JONES *et al.*
vs.
WALTER CRAIG. } No. 193–H.

The demurrer of the defendant in this cause having come on to be heard, and the court being fully advised in the premises, finds the said demurrer well taken, and, therefore, sustains the same, and,

on motion of the plaintiffs, leave is granted to said plaintiffs to amend said bill of complaint within thirty days.

Thereupon, afterwards, to wit, on the 12th day of June, 1884, amended bill was filed in said case, which said amended bill is in words and figures following, to wit:

11 In the Circuit Court of the United States for the District of Nebraska. In Chancery.

To the judges of the circuit court for the district of Nebraska:

Complaining unto your honors your complainants, Henry O. Jones and John Jort, showeth that they, the said complainants, are residents and citizens of the State of Nebraska, and that the defendant, Walter Craig, is a citizen and resident of the State of Ohio.

Complainants further show to your honors that on the 2d day of June, 1857, one William Finney was the owner in fee-simple of the following-described lands, situate in the county of Douglas and State of Nebraska, to wit: The southwest quarter of section four (4), in township fifteen (15) north, of range twelve (12) east, and that on said June 2d, 1857, being desirous of effecting a loan of money upon said land, made an arrangement with the said Walter Craig whereby he, the said Finney, obtained a loan from the said Craig for the sum of two hundred and eighty-two dollars, and upon said day executed and delivered to a firm doing business in Omaha by the name and style of John McCormick & Co., who were in that regard acting as the agents of said Walter Craig, his promissory note for that amount, payable June 2d, 1858, one year after the date thereof, and in order to secure the payment of the said sum of money executed and delivered to the said Craig an absolute deed of the said premises, and upon the same day, June 2d, 1857, and as a part of the same transaction, the said firm of John McCormick & Co., by their firm name acting as the agents of the said Craig (the said Craig being the person who advanced the said sum of money to the said
12 Finney and being the only person interested therein), executed and delivered to the said Finney a defeasance or bond, as by the statue of the then Territory of Nebraska was provided, in the words and figures following, to wit:

"John McCormick & Co., of the county of Douglas and Territory of Nebraska, agree to have sold and conveyed by deed unto William Finney, of Douglas county, Nebraska Territory, the following-described tract of land in the county of Douglas, Territory aforesaid: The southwest quarter of section four (4), in township fifteen (15) north, of range twelve (12) east, in the Omaha land district, on condition of said William Finney paying promptly, time being the essence of the contract, a certain promissory note giving June 2d, 1857, calling for two hundred and eighty-two dollars, due June 2d, 1858. If said note is not paid when due we are privileged to enter upon and occupy said land, or to allow the said Wm. Finney to do so at our option. It is understood by the parties hereto that the said William Finney is to pay all taxes that may accrue on said

land and is not to cut the timber, except for farming purpose, then this bond to be carried into full effect, provided no pre-emption right attach upon and vacate the present entry of said land.

Omaha City, N. T., June 2d, 1857.

(Signed) JOHN McCORMICK & CO."

The said deed from the said Finney to the defendant, Craig, was recorded in the records of deeds of Douglas county aforesaid on the day of its execution, to wit, June 2, 1857, but the said bond or defeasance was not so recorded until January 6th, 1864, nearly seven years after its execution.

Complainants further show that the transaction, as aforesaid,
13 between the said parties was intended to be the loaning of money and taking security for the payment thereof, and it was so treated by said parties from the time of the said transaction until June, 1880, as hereinafter set forth, and was by the law of the place of its execution a mortgage and nothing more. The said firm of John McCormick & Co., had no interest other than agents of said Craig in said transaction, and the sole and only parties having any pecuniary interest therein were the said defendant and the said William Finney.

Further complaining, your orators show that the said Finney having received the patent to said land prior to said transaction was in possession thereof, and remained in such possession until July 3d, 1857, when for a valuable consideration, viz., $500.00 to him in hand paid by Nathaniel Ervin, he, the said Finney, conveyed the said land by deed to the said Ervin, without any notice on the part of the said Ervin of the mortgage held upon said land by the defendant Craig. The said defendant, or other persons for him, were never in possession of the said land or any part thereof.

Afterwards, viz., September 14th, 1859, the defendant Craig, with others, the members of the firm of John McCormick & Co., filed their bill of complaint in the district court of Douglas county, Territory of Nebraska, against the said Finney and Ervin, alleging the facts of said transaction between the said parties as hereinbefore set forth of the execution of the said deed, defeasance, and note and by their bill of complaint therein prayed the court for relief as follows: "That on the final hearing the said deed to the said Walter Craig and bond of defeasance thereof may be declared a mortgage and a lien, as such, upon the said premises from the day of the date thereof
and prior to the lien or claim of the said Ervin, and that an
14 account may be taken under the direction of this (said) court of what is (was) due, and 'that said mortgaged premises may be sold under the decree of this (said) court and the proceeds thereof applied to the payment of the said debt.'"

The said parties so as aforesaid made defendants in said cause were served with process, and the answer of the defendant, Ervin, coming in, under the rules and direction of said court, has therein disclosed that the said Ervin had no knowledge of the lien or claim by way of mortgage upon said premises of the said Craig or other parties, and that he, the said Ervin, was a *bona fide* purchaser of

said premises for value, and thereupon the said Craig dismissed his said bill of complaint out of said court at his, said Craig's, costs and charges, upon the 8th day of July, 1861, and has never since sought to further prosecute his said cause of action upon said mortgage.

Further complaining unto your honors, your orators show that now, notwithstanding the facts as hereinbefore set forth, the said Craig claims to hold the legal title to said property by reason of the said deed from the said Finney to the said Craig, executed and delivered solely for the purpose of securing the payment of the said sum of money aforesaid and for no other purpose, and in June, 1880, commenced an action in ejectment in this court upon the law side thereof to recover the legal title to said premises, which action is based upon the said deed and nothing else, which action is now pending and undetermined. Said action in ejectment was commenced against your orator, Henry O. Jones, he having become possessed of the legal title and possession as hereinafter set forth. Said Craig never had any other or greater interest in said premises than by way of mortgage as aforesaid. Said premises are of the full value of $6,000.00.

Your orators further show that the said Nathaniel Ervin continued to own and control the said premises from the time of his said purchase from Finney, in July, 1857, aforesaid, until December 11th, 1875, when the complainant, Henry O. Jones, for a good and valuable consideration, purchased the same from the said Ervin and at once went into possession thereof and so continued until May 1st, 1882, he sold the said premises to the complainant, Jort, for a valuable consideration, with covenants of warranty, receiving from the said Jort part payment in cash and a mortgage upon said premises from the said Jort for the remainder of the said purchase price, and now holds the said mortgage.

Your orator, John Jort, is a *bona fide* owner of said premises, and acts and doings of the said defendant are contrary to equity and good conscience and tend to the manifest wrong and injury of the complainants in the premises aforesaid. In consideration whereof and as much as your orators can only have adequate relief in a court of equity where such matters are properly cognizable and relievable:

To the end, therefore, that the said Walter Craig may answer hereunto (answer under oath being hereby expressly waived), and upon the final hearing it may be decreed that the transaction between the said Finney, Craig, and John McCormick & Co. was the simple borrowing of money and the giving of a mortgage to secure the payment thereof, and that said deed, bond of defeasance, and note was a mortgage, and that your honors will grant unto your orators during the pendency of this suit an order restraining the said Walter Craig, his agents and attorneys, from further prosecuting their said cause in ejectment against your orator, Jones, and upon the final hearing that they may be perpetually so restrained and enjoined, and that your orators may have such other and further relief as to the court shall seem meet.

May it please the court to grant unto your orators the most gra-

cious writ of subpœna, to be directed to the said Walter Craig, thereby commanding him, at a certain day and under a certain pain therein to be named, personally to be and appear before your honors in this court and then and there full and perfect answer make to all and singular the premises; and further, to stand, to perform, and abide such further order, direction, and decree therein as to your honors shall seem meet.

And your orators will ever pray, &c.

CHAS. H. BROWN,
Att'y for Complainant.

G. W. AMBROSE,
Of Counsel.

UNITED STATES OF AMERICA, *District of Nebraska,* } ss:

Henry O. Jones, being duly sworn, says that he is one of the complainants in the foregoing bill of complaint and that the matters and things stated therein are true to the personal knowledge of affiant.

HENRY O. JONES.

Sworn to before me this 12th day of June, 1884, and subscribed in my presence.

ELMER D. FRANK, *Clerk.*

Upon the back of said amended bill apear endorsements in words and figures following, to wit: No. 193—H. Henry O. Jones *et al. vs.* Walter Craig. Amended bill of compl't. Chas. H. Brown and G. W. Ambrose, att'ys. Filed Jun. 12, 1884. Elmer D. Frank, clerk.

17 Thereupon, afterwards, to wit, on the 28th day of August, 1884, demurrer to amended bill of complaint was filed in said case, which said demurrer is in words and figures following, to wit:

Demurrer to Amended Complaint.

In United States Circuit Court, District of Nebraska.

HENRY O. JONES *et al.*, Complainants,

vs.

WALTER CRAIG, Respondent.

This respondent, by protestation, not confessing or acknowledging all or any of the matters and things in the said amended bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainants have not by their said bill made such a case as entitles them in a court of equity to any relief from or against this respondent touching the matters contained in the said bill or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this respondent doth demur to said amended bill, and to all matters and things therein contained, and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

I certify that it is my opinion the foregoing demurrer of Walter Craig, respondent, to the bill of complaint of Henry O. Jones *et al.*, complainants, is well founded in law and proper to be filed in the above cause.

W. J. CONNELL,
Counsel for Respondent.

18 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

William J. Connell, being first duly sworn, deposes and says that he is attorney for said Walter Craig, respondent, who is now absent from this State; that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any other proceedings therein.

W. J. CONNELL.

Subscribed in my presence and sworn to before me this 26th day of August, 1884.

ELMER S. DUNDY, *Judge.*

Upon the back of said demurrer appear endorsements in words and figures following, to wit: No. 193—H. In United States circuit court, district of Nebraska. Henry O. Jones *et al.*, complainants, *vs.* Walter Craig, respondent. Demurrer to amended complaint. Filed Aug. 28, 1884. Elmer D. Frank, clerk. William J. Connell, attorney for respondent.

Thereupon, afterwards, at the November term of said court, on the 2nd day of January, 1885, the following proceedings were had, as appears of record, on folio 697, journal "I," of said court, to wit:

HENRY O. JONES *et al.* }
vs. } 193—H.
WALTER CRAIG. }

This cause coming on to be heard upon the demurrer of the defendant to the amended bill of complaint filed herein and the court, being fully advised in the premises, it is ordered that if within fifteen days the plaintiff bring into court the amount of the note and mortgage set forth in the bill of complaint, with interest thereon
19 from the time the note became due, with interest thereon at ten per cent. per annum until Nov. 1, 1879, and from Nov. 1, 1879, to date of this order, at seven per cent. per annum, together

with all taxes paid by defendant upon the land described in said bill, with interest thereon at ten per cent. per annum, then the defendant be restrained from the further prosecution of the cause in ejectment set forth in said bill of complaint and entitled Walter Craig *vs.* Henry O. Jones; but if the plaintiff shall fail so to do within the time mentioned the said demurrer to said bill be sustained and the said bill of complaint be dismissed, and the defendant herein be allowed to proceed with the prosecution of his said action at law. To the ruling and decision of the court the plaintiffs except.

Thereupon, afterwards, at the January term of said court, on the 7th day of January, 1885, the following proceedings were had and done, as appears of record, on folio ——, journal "I," of said court, to wit:

Appeal Prayed and Allowed.

HENRY O. JONES *et al.*
vs.
WALTER CRAIG. } No. 193—H.

Now, on this day, come the complainants, by Ambrose & Brown, their solicitors, and in open court pray an appeal herein, which is allowed by the court; and it is thereupon ordered that a supersedeas bond be given in the sum of fifteen hundred ($1,500.00) dollars.

20 Thereupon, afterwards, to wit, on the 9th day of March, 1885, a bond was filed in said case, which said bond is in words and figures following, to wit:

Know all men by these presents that we, J. J. Brown and L. J. Kennard, each of the city of Omaha, are held and firmly bound unto Walter Craig in the full and just sum of fifteen hundred dollars to be paid to the said Walter Craig his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of March, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas, lately at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Henry O. Jones and John Jort, complainants, and Walter Craig, defendant, judgment was rendered against the said Henry O. Jones and John Jort of dismissal and the said Henry O. Jones and John Jort having obtained an appeal & transcript and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Walter Craig citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next.

Now, the conditions of the above obligation is such that if the said Henry O. Jones & John Jort shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

J. J. BROWN & L. J. KENNARD.

Approved by—

ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 193—H. United States circuit court, district of Nebraska. Henry O. Jones *et al. vs.* Walter Craig. Bond. Filed March 9, 1885. Elmer D. Frank, clerk.

21 Thereupon, afterwards, to wit, on the said 9th day of March, 1885, a citation was issued in said case, of which the following is the original copy:

22 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To Walter Craig, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal obtained from the said circuit court of the United States for the district of Nebraska in the case wherein Henry O. Jones & John Jort are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, [Morrison R. Waite] Chief Justice of the Supreme Court of the United States, at Omaha, this 9th day of March, 1885.

[Seal United States Circuit Court, District of Nebraska.]

ELMER L. DUNDY, *Judge.*

MARCH 10TH, 1885.

Service accepted.

W. J. CONNELL,
Att'y for Craig.

[Endorsed:] No. 193—H. United States circuit court, district of Nebraska. Henry O. Jones *et al.*, appellants, *vs.* Walter Craig, appellee. Citation. Filed March 9, 1885. Elmer D. Frank, clerk.

23 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Elmer D. Frank, clerk of the circuit court of the United States for the eighth circuit and district of Nebraska, do hereby certify that the foregoing folios from one to 22 contain true and faithful tran-

scripts of all pleadings and proceedings of record and on file in my office as said clerk and the whole thereof and the endorsements thereon in the case of Henry O. Jones *et al. vs.* Walter Craig, and that a copy of the citation has been lodged and remains in my office.

Witness my hand and the seal of said circuit court, at Omaha, this 10th day of March, A. D. 1885.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 235. Henry O. Jones and John Jort, appellants, *vs.* Walter Craig. Filed June 11, 1885.

24-213

DEC 6 1887

IN THE

SUPREME COURT

OF THE UNITED STATES.

GEORGE BARKER, ADMINISTRATOR OF HENRY O. JONES, DECEASED, AND JOHN JORT, *Plaintiffs.*

vs.

[redacted] CRAIG, *Defendant.*

BRIEF OF PLAINTIFFS.

G. E. PRITCHETT, *Attorney for Plaintiff.*

AMBROSE & MUNN, *of Counsel.*

scripts of all pleadings and proceedings of record and on file in my office as said clerk and the whole thereof and the endorsements thereon in the case of Henry O. Jones *et al. vs.* Walter Craig, and that a copy of the citation has been lodged and remains in my office.

Witness my hand and the seal of said circuit court, at Omaha, this 10th day of March, A. D. 1885.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 235. Henry O. Jones and John Jort, appellants, *vs.* Walter Craig. Filed June 11, 1885.

24-213

DEC 6 1887
JAMES H. MCKENNEY
CLERK

IN THE

SUPREME COURT

OF THE UNITED STATES.

GEORGE BARKER, ADMINISTRATOR OF HENRY O. JONES, DECEASED, AND JOHN JORT, *Plaintiffs.*

vs.

WALTER CRAIG, *Defendant.*

BRIEF OF PLAINTIFFS.

G. E. PRITCHETT, *Attorney for Plaintiff.*

AMBROSE & MUNN, *of Counsel.*

IN THE

SUPREME COURT

OF THE UNITED STATES.

GEORGE BARKER, ADMINISTRATOR OF HENRY O. JONES, DECEASED, AND JOHN JORT, *Plaintiffs.*

VS.

WALTER CRAIG, *Defendant.*

BRIEF OF PLAINTIFFS.

This was a bill filed in the Circuit Court for the District of Nebraska, by Henry O. Jones and John Jort against the defendant.

Henry O. Jones has since departed this life and the case now, by the stipulation of the attorneys, stands revived in the name of his administrator.

The object of said bill was to remove a cloud upon the title of certain lands set forth therein.

The following are the main facts upon which the plaintiff relied: That, on the second day of June, 1857, one William Finney was the owner in fee simple of the lands set forth

in said bill, and that on said day being desirous of effecting a loan of money upon said land, made an arrangement with the defendant and John McCormick, George T. Hogg and William Hogg, all of whom were partners, and doing business in Omaha, Nebraska, under the firm name of John McCormick & Company, whereby he obtained a loan of the sum of $282, and executed and delivered to the said firm of John McCormick & Company his promissory note for that amount, payable one year after date thereof with interest at the rate of 10 per cent. per annum, and in order to secure the repayment thereof of said sum of money, executed and delivered to the defendant an absolute deed of the premises described in said bill. And upon the sme day, June 2d, 1857, and as a part of the same transaction, the said firm of John McCormick & Company, acting as the agents of the said defendant (the said defendant being the person who advanced the money in said note mentioned, and being the only person interested therein) executed and delivered to the said Finney a defeasance or bond as by the statute of the then territory of Nebraska was provided. Which defeasance was as follows: "John McCormick & Company of the county of Douglas and Territory of Nebraska agree and have sold and conveyed by deed unto William Finney of Douglas County, Nebraska Territory, the following described tract of land in the county of Douglas, territory aforesaid, the south-west ¼ of Section 4 in Township 15 north of range 12 East in the Omaha Land District, on condition of said William Finney paying promptly, time being the essence of the contract, a certain promissory note given June 2nd, 1857, calling for $282 due June 2nd, 1858. If said note is not paid when due we are privileged to enter upon and occupy said land or to allow the said Willian Finney to do so at our option....."

The deed by the said Finney to the defendant Craig was duly recorded on the date of its execution, but the said bond or defeasance was not so recorded until January 6th, 1864, nearly seven years after its execution.

The transaction between the said parties was entitled to be and was so treated by them, and was by the law of the place of its execution, a mortgage and nothing more. The firm of John McCormick & Co. had no interest in said transaction, and the only parties interested therein were the said Finney and the defendant. The said Finney remained in the possession and title to said premises, he having received the patent therefor, until June 3d, 1857, when for a valuable consideration paid by one Nathaniel Ervin, he, the said Finney, conveyed the said land by warranty deed to the said Ervin without any notice on the part of the said Ervin, of the mortgage held upon the said land by the defendant Craig. The said bond or defeasance not being recorded so as to make the same effective.

On September 14th, 1859, the said defendant with others, the member of the said firm of John McCormick & Co., filed their bill of complaint in the District Court of Douglas County, Nebraska, against said Finney and Ervin, alleging the said facts and said transactions, as hereinbefore set forth, of the execution of said deed, defeasance and note, and praying, "That on the final hearing the said deed to the said Walter Craig and bond of defeasance may be decreed a mortgage and lien as such upon the said premises from the day of the date thereof, and that an account may be taken under the direction of said Court of what was due, and that said mortgaged premises may be sold under the decree of this Court, and the proceeds thereof applied to the payment of said debt." The said parties having been served with

process, and the answer of said Ervin coming in, it was therein disclosed that he, the said Ervin, had no knowledge of the lien or claim by way of mortgage upon the said premises of the said Craig or other parties, and that he, the said Ervin, was the *bona fide* purchaser of said premises. The said Craig and others, as aforesaid, dismissed said cause out of said Court, and have never sought to further prosecute their said cause of action, or do anything to secure a lien upon said premises for said alleged indebtedness. Said cause of action was so dismissed out of said Court on the 8th day of July, 1861.

It further appears from said bill that said alleged indebtedness has never in any manner been renewed or extended by said parties, and all claim by reason thereof has long since been abandoned, and the said Craig, from the date of the dismissal of said cause of action aforesaid, until June, 1880, has never made any claim to said premises, but upon said last date aforesaid he commenced an action in the Circuit Court of the United States for the District of Nebraska, upon the law side thereof in ejectment against said Jones, claiming to be the owner of the fee in said premises by virtue of the said deed from the said Finney to him, the said Craig, which was executed and delivered in the manner hereinbefore set forth, and for no other purpose than to secure the payment of the said sum of money. At the time of the filing of this bill said suit was then pending.

It is further alleged in said bill of complaint, that the said defendant herein never had interest in said premises except by way of said deed and bond of defeasance, and that the alleged indebtedness sought to be secured thereby was long since and was at the time of filing said bill barred by the statutes of limitation of said state, and that all claim by

reason of said mortgage transaction have become extinct by reason of lapse of time aforesaid, and that said deed and bond of defeasance are a cloud upon the title of said premises.

It is further alleged in said bill that the said Ervin continued to own and control said premises from the time of his said purchase from Finney until December 11th, 1875, when the said Henry O. Jones for a valuable consideration, purchased the same and went into possession thereof and so continued until the first day of May 1882. When upon said last date he sold the premises to his co-plaintiff Jort for a valuable consideration. That the said Jort was the *bona-fide* owner of said premises, and that at the date of said sale to said Jort the statutes of limitations had completely run against said mortgage and the same was wholly barred by the statute of limitation.

To this bill a general demurrer was filed by the defendant upon the hearing of which the circuit court of Nebraska made a decree holding that the same was a mortgage, and requiring the plaintiff to pay into court the amount of said mortgage and interest, and that thereupon the prosecution of said suit in ejectment would be restrained and enjoined. From which decree the plaintiffs prosecute this appeal.

The instruments by section 25, page 478 of the Compiled Statutes of Nebraska for the year 1885 was a mortgage. And the whole tenor of authorities of this country is that such a transaction is a mortgage.

M'Gaw vs. Marshall, 7 Humphreys, 721.
Baldwin against Jenkins, 1 Cushman, 206.

The courts universally hold that in an ordinary form of a mortgage this appears upon the face of the deed and by the bond to which it refers. But the effect will be the same

where the true object of the conveyance is shown by any other instrument although not referred to in the deed itself.

Dey vs. Dunham, 2nd Johnson Ch. 182.

15th John, 355, Jackson vs. Green, 4 Johns 186.

Cooper vs. Whitney, 3 Hill, 95 and other authorities cited in 3d Leading Cases in Equity, Hare and Wallace's notes. page 625.

Montgomery vs. Chadwick, 7th Iowa, 114.

Hallesey vs. Jackson, 66th Ill., 139.

Shillaber vs. Robinson, 97th U. S. Reports, 68.

Arrington vs. Liscom, 34 Cal., 365.

I need not say to this court that in the prosecution of the action at law commenced by Craig and which was sought to be enjoined by this bill, that the courts at law would only take cognizance of legal title, and the rights which the statutes of limitations give them of ten years under the statutes of Nebraska could not be shown by them in the defense of the said law action, and that the only remedy of the plaintiff was to disclose the fact as by this record shown, that this deed was a mortgage and that it never had been renewed and was barred by the statute of said state. As was said by this court in Hughes vs. Edwards, 9th Wheaton 489, " A court of equity looks to the substantial object of the conveyance and will consider an absolute deed as a mortgage when it is shown to have been intended merely as a security for the payment of the debt."

And the court says further in its opinion that " where the mortgagor " as in this case " has been permitted to retain possession, the mortgage will after a length of time be presumed to have been discharged by payment of the money or a release, unless circumstances can be shown sufficiently

strong to repel the presumption, as payment of interest, a promise to pay, an acknowledgement by the mortgagor that the mortgage is still existing and the like."

All these requisites are refuted in the allegations of the bill and admitted to be true by the demurrer.

This court in 16 Howard, 571, in speaking of this class of cases used this language, "Twenty years undisturded possession without any admission of holding under a mortgage or treating it as a mortgage during that period is a bar to a bill to redeem, but if within that period there be any account or solemn acknowledgment of the mortgage as subsisting, it is otherwise."

Dexter vs. Arnold, 1 Sumn. C. C. 109.

It is universally held, that the statute of limitations is taken as a guide, and the time prescribed as the period beyond which an entry can not be made, mortgagor who does not come forward within that time will be barred.

Skinner vs. Smith, 1 Day, 124.

Jarvis vs. Woodruff, 22 Conn. 548.

I think under the law this case should be reversed.

AMBROSE & MUNN.
of Counsel.

G. E. PRITCHETT,
Attorney for Plaintiffs.

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IN THE SUPREME COURT

OF THE

UNITED STATES.

GEORGE BARKER, ADMINISTRATOR, *et al.*,
Plaintiffs,
vs.
WALTER CRAIG,
Defendant.

W. J. CONNELL,
Attorney for Defendant.

REES PRINTING CO., OMAHA.

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Plaintiffs,
vs.
WALTER CRAIG,
Defendant.

BRIEF OF DEFENDANT.

The defendant in this action has a perfect title of record to the land in controversy. An action of ejectment was commenced by him and is now pending to secure possession of said land. His claim of title being complete, it was manifest that he would secure possession of the land.

To prevent him from so doing, this action was commenced and a temporary injunction was allowed restraining him from prosecuting his said action of ejectment. The

claim of plaintiffs is that the deed made to defendant, although absolute upon its face, was in fact a mortgage. The position of defendant is that, even if this be so, the plaintiffs, who ask the interposition of a court of equity, must offer to do equity. This they refuse to do.

They demand that the deed executed to defendant be declared a mortgage, without offering to pay him the money which they admit he advanced. To grant the relief asked, without first requiring the repayment of the taxes and money loaned, with legal interest thereon, would be a gross injustice, for by reason of the debt being barred by the statute of limitations, the plaintiffs would wholly escape liability.

The opinion rendered by the Circuit Judge who heard and decided the demurrer was as follows:

Jones et al. vs. Craig.

I hold that this defendant has a good cause of action in the other case of Craig vs. Jones, and that he would be entitled to a judgment for the premises in dispute, if permitted to prosecute the suit last named. The deed on which Craig bases his right to recovery, was given to secure the payment of money, and is, therefore, in effect, a mortgage, which the plaintiff seeks to have declared as such, in order to defeat the operation of the deed or mortgage.

The mortgage has not been paid, but it is claimed that the statute of limitations bars the cause of action and therefore the claim to the property is worthless.

If Craig had brought suit to foreclose the mortgage, then such a defense could have been successfully interposed. But he did not seek to foreclose what is supposed to be a mortgage, but what is, in fact, on its face, a *deed absolute.* He seeks to recover possession of the land, to which he would be entitled unless his deed shall be declared to be a mortgage.

Before this plaintiff can deprive him of the right to proceed on the law side of the court to recover possession of the land, he, plaintiff, must do, or offer and be ready to do, what equity requires in such and similar cases.

That is, he must pay off the mortgage, or bring the

money into court for such purpose, and pay the legal taxes with interest, which the other party has paid.

The bill ought to state readiness of compliance to do this. As it does not do so, it is defective and the demurrer must be sustained.

If the plaintiff will amend bill and bring into court proper amount of money to redeem, and pay taxes, all of same to bear interest from time money was due and interest on taxes from date of payment, at present rate of interest, then perpetual injunction can be allowed.

Cost of both suits to abide further order.

We submit that the foregoing opinion is sound and correct and in accord with the decisions of this court.

W. J. CONNELL,
Attorney for Defendant.